United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 08-269**
	)	**Issued: May 1, 2008**
DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Milton, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 5, 2007 appellant filed a timely appeal from an August 7, 2007 nonmerit decision of the Office of Workers' Compensation Programs which denied his request for reconsideration without reviewing the merits of the claim. Because more than one year has elapsed from the last merit decision, dated July 17, 2006, to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration without conducting a merit review.

FACTUAL HISTORY

On March 24, 2005 appellant, then a 46-year-old quality assurance specialist, filed an occupational disease claim stating that he developed bilateral hearing loss in the performance of duty. Appellant first realized his condition on February 25, 2005. He did not stop work. In a

March 22, 2005 statement, appellant noted his history of noise exposure at the employing establishment. The employing establishment provided personnel records and audiograms establishing that appellant had worked in his federal civilian employment since approximately 1983 and had previously been exposed to noise from various sources while working in the military between 1977 and 1983.

On August 17, 2005 the Office referred appellant, along with a statement of accepted facts, to Dr. John S. Keebler, a Board-certified otolaryngologist, for a second opinion examination to determine whether appellant had developed bilateral hearing loss as a result of his federal civilian employment.

In a September 6, 2005 report, Dr. Keebler diagnosed bilateral moderate sensorineural hearing loss and opined that it was due to noise exposure during appellant's federal civilian employment. He noted that appellant's hearing capability had changed significantly since beginning his employment in 1983. Dr. Keebler recommended that appellant undergo yearly audiograms, avoid noise exposure and consider hearing aids. An audiogram performed on Dr. Keebler's behalf tested appellant's hearing at the 500, 1,000, 2,000 and 3,000 cycles per second levels and recorded the following losses: 30, 35, 25 and 30 decibels in the right ear and 40, 35, 40 and 45 decibels in the left ear.

In a September 27, 2005 report, an Office medical adviser applied Dr. Keebler's audiometric findings to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He concluded that appellant had 10 percent binaural hearing loss.

By decision dated September 29, 2005, the Office accepted appellant's claim for bilateral noise-induced hearing loss. On October 10, 2005 appellant claimed a schedule award. On April 6, 2006 the Office granted appellant a schedule award for 10 percent binaural hearing impairment. By correspondence dated April 17, 2006, appellant requested a review of the written record.

By decision dated July 17, 2006, an Office hearing representative affirmed the schedule award, finding that appellant had not presented any medical evidence to establish greater impairment.

In a July 13, 2007 request for reconsideration, appellant stated that he was submitting a report from Dr. Michael J. Rinaldi to support additional hearing impairment. Appellant asserted that the Office should refer his claim to an impartial medical examiner. He also contended that the Office was obliged to request a supplemental report, if needed, from his attending physician. No report from Dr. Rinaldi appears in the record.

By decision dated August 7, 2007, the Office denied appellant's request for reconsideration, without conducting a merit review. It found that the evidence was insufficient to warrant further merit review of his claim.

LEGAL PRECEDENT

Under section 8128 of the Federal Employees' Compensation Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review.

Section 10.606(b)(2) of the implementing federal regulations provides guidance for the Office in using this discretion.[1] The regulations provide that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[2]

Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[3] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[4]

ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration without conducting further merit review because appellant did not submit new or relevant evidence with his request. Appellant submitted a brief from his attorney. Although he did present legal arguments, they were premised on a report from Dr. Rinaldi, which does not appear in the record. Appellant's attorney asserted that the Office should find a conflict of medical evidence and refer the matter to an impartial specialist for an examination. However, appellant did not submit a medical report or otherwise any physicians, whose reports appear in the record, that disagree with the rating of his impairment. His contention on this point is without merit.[5] Appellant also argued that the Office was obliged to seek a supplemental report from his treating physician. However, the record does not reflect that he ever submitted a report from a treating physician. Accordingly, appellant's legal arguments are not relevant. While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for

[1] 20 C.F.R. § 10.606(b)(2) (1999).

[2] *Id.*

[3] 20 C.F.R. § 10.608(b) (1999).

[4] *Annette Louise*, 54 ECAB 783 (2003).

[5] *See* 5 U.S.C. § 8123(a) (provides that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination).

further review of the merits is not required where the legal contention does not have a reasonable color of validity.[6]

The Board also finds that appellant has not met the third regulatory criterion justifying a merit review. Appellant's attorney indicated that he would provide new and relevant medical evidence in the form of a report from Dr. Rinaldi. As noted, however, no such report is of record.[7] Appellant has not submitted any medical evidence in support of his request for reconsideration. Consequently, the Board finds that the Office properly denied appellant's request for reconsideration as he did not submit any new or relevant evidence pertaining to the extent of his hearing loss.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without reviewing the merits of the claim.

ORDER

IT IS HEREBY ORDERED THAT the August 7, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[6] *See Cleopatra McDougal-Saddler*, 50 ECAB 367 (1999).

[7] On appeal, appellant submitted additional medical evidence. The Board, however, notes that it cannot consider this evidence for the first time on appeal because the Office did not consider this evidence in reaching its final decision. The Board's review is limited to the evidence in the case record at the time the Office made its final decision. 20 C.F.R. § 501.2(c).